127823

STATE OF MICHIGAN

IN THE SUPREME COURT

(ON APPEAL FROM THE MICHIGAN COURT OF APPEALS)

BEVERLY HEIKKILA, as Personal Representative
Of the Estate of Sheri L. Williams,

Plaintiff-Appellee,

v

NORTH STAR TRUCKING, INC., a
Michigan Corporation,

Defendant,

and

MARC ROLLAND SEVIGNY, and J.R. PHILLIPS
TRUCKING, LIMITED, a Foreign corporation,
jointly and severally,

Defendants-Appellees,

and

NORTH STAR STEEL COMPANY,
a Michigan Company,

Defendant-Cross-
Plaintiff-Appellee,

v

INTERNATIONAL MILL SERVICE, INC.,
a Michigan Corporation,

Defendant/Cross-
Defendant-Appellant.

_____/

S.C. No. 127823
(related docket nos.
127780; 127836)
C.A. No. 246761
L.C. No. 00-011135-NI

DEFENDANT-APPELLANT INTERNATIONAL MILL SERVICE, INC.'S REPLY BRIEF

PROOF OF SERVICE

PLUNKETT & COONEY, P.C.

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STATEMENT CONCERNING COMPLAINED-OF OPINION AND SETTING FORTH REQUESTED RELIEF

Defendant-Appellant International Mills Services, Inc. ("International") refers this Court to the corresponding subsection in its Application for leave to appeal, dated January 18, 2005 ("Application").

STATEMENT OF THE QUESTIONS PRESENTED

International refers this Court to the corresponding section in its Application.

STATEMENT REGARDING APPELLATE JURISDICTION

International refers this Court to the corresponding section in its Application. This brief is filed in reply to Plaintiff's response brief, dated November 21, 2005, and in response to this Court's October 14, 2005 order, instructing that the parties may file supplemental briefs, but avoid submitting mere restatements of the arguments made in their application papers.

STATEMENT OF FACTS

International refers this Court to the corresponding section in its Application.

Standards of Review and Supporting Authority

International refers this Court to the corresponding subsection in Arguments I and II of its Application.

ARGUMENT I

THE TRIAL COURT PROPERLY GRANTED INTERNATIONAL'S MOTION FOR SUMMARY DISPOSITION WHEN PLAINTIFF FAILED TO PRESENT ADMISSIBLE EVIDENCE WHICH REMOVED PLAINTIFF'S THEORY OF CAUSATION FROM THE REALM OF SPECULATION AND CONJECTURE.

At pages 32-35 of her brief on appeal, Plaintiff contends that there exists a question of fact on the issue of proximate cause, and relies upon the foreseeability evidence and analysis that is discussed in the duty argument directed at both International and North Star Steel, Inc. In reply, International refers this Court to the duty argument in this brief, in which International explains that its alleged activities in failing to keep its operations reasonably clean and free of slag (which is the only duty of care theory now pursued by Plaintiff, see Argument II) do not create a foreseeable risk of harm to the Plaintiff's decedent, who never set foot on the premises and whose injuries did not arise from a foreseeable sequence of events as to International (slag left on the premises; slag picked up by truck or trailer through its wheels; tractor trailer leaves premises where slag loosens and strikes plaintiff's vehicle). Although International does not concede that Plaintiff has established proofs necessary to

support each leg of this sequential analysis, to the extent such proofs exist, they do not create proximate cause as a matter of law as to International.

It is interesting to note that Plaintiff's response does not address "but for" causation, but only legal causation. This omission by Plaintiff is fatal because both cause-in-fact and legal causation must be demonstrated before the case can be presented to the jury. *Haliw v Sterling Heights,* 464 Mich 297, 310; 627 NW2d 581 (2001)

International will not repeat the arguments set forth in its Application, which address the speculative nature of the cause-in-fact evidence to support the theory that the Plaintiff's decedent was struck by slag, and that such slag, if reasonably established without speculation, can be traced back to International. .

International otherwise joins in the reply briefs filed by its Co-Defendants.

ARGUMENT II

PLAINTIFF FAILED TO PRESENT FACTS DEMONSTRATING THE EXISTENCE AND BREACH OF ANY DUTY OWING BY INTERNATIONAL.

At pages 22-25 of her response, Plaintiff contends only that International had a duty "separate and distinct" from contract to keep its premises clean and free from debris which, according to Plaintiff, was breached and proximately resulted in the decedent's death. There are several flaws with this argument. First, this "premises liability" theory does not appear in Plaintiff's first amended complaint (see **Exhibit F** to International's Application). Plaintiff's theories of liability against International are contained in Counts III and IV. In Count III, each

of the factual allegations is premised upon International's assumed contractual obligation to process and remove scrap materials created by North Star Steel's operations (¶ 44), including an alleged obligation to properly load any and all motor vehicles (¶¶ 45-46) and alleged duty to inspect motor vehicles in the course of such contractual obligations (¶¶ 47-48).[1] In the remaining count, Count IV, paragraphs 54 and 55 are premised upon an alleged duty to inspect, which was abandoned by Plaintiff below. That leaves paragraphs 56-58 which, in the estimation of International, fail to state a premises liability duty separate and distinct from contract:

> "¶56. Defendants individually and collectively had the ability to avoid resulting harm by exercising ordinary care and diligence.
>
> ¶57. Defendants, individually and collectively, in callous disregard of their duties and obligations, failed to use such care and diligence to avert a threat of danger which, to the ordinary mind, was apparent that the result was likely to prove disastrous to another, in particular, Plaintiff's decedent.
>
> ¶58. Defendants, individually and collectively, had a deliberate indifference to the welfare and safety of the public on the traveled portions of the highway including [but not limited to] Plaintiff's decedent."

Exhibit F, pp 14-15.

In each of these paragraphs, Plaintiff references the resulting harm by failing to properly perform the inspections referred to in the preceding two paragraphs, 54 and 55. There is no freestanding factual allegation of premises

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[1] As indicated in footnote 2 of International's Application, any duty to inspect was abandoned by Plaintiff in response to International's motion for summary disposition.

liability, separate, distinct, and independent of an: (1) alleged breach of duty to inspect (waived by Plaintiff below); and (2) a duty arising out of a contract (previously briefed by International and now conceded by Plaintiff by lack of briefing).

Second, assuming *arguendo* that Plaintiff has alleged a premises liability theory, it is not recognized at law under these circumstances. Plaintiff's sole legal authority is the Restatement of Torts (Second), § 371, entitled "Possessor's Activities," which provides in its entirety :

> "A possessor of land is subject to liability for physical harm to others outside the land caused by an activity carried on by him thereon which he realizes or should realize will involve an unreasonable risk of physical harm to them under these same conditions as though the activity were carried on at a neutral place."

(hereinafter "§ 371").

Notably, Plaintiff fails to cite a single Michigan case, either from this Court or the Court of Appeals, which holds that a duty of care arises under § 371. International's research likewise fails to uncover a single Michigan appellate decision in which a duty of care has been recognized under § 371. Therefore, the best Plaintiff can muster is that this Court should establish law in this case, adopt § 371 or some version thereof as the law of Michigan, and acknowledge a duty of care exists in these circumstances between International and the Plaintiff's decedent, who never even visited the North Star Steel premises (on which the alleged culpable activity by International took place). Although some states have acknowledged a duty of care arising under § 371 (discussed *infra*), those cases involve both readily identifiable plaintiffs and, more importantly, ultra-

hazardous or inherently dangerous activities occurring on the premises of the possessors which were known by the possessors to involve unreasonable risks of physical harm to others as if those very same activities were carried on at the locations of the injuries. For example, in *Vermillion v Pioneer Gun Club*, 918 SW2d 827 (Mo. App 1996), a duty was imposed upon operators of a firing range, who certainly understood that the use of guns and ammunition could cause an unreasonable risk of harm not only on the premises itself, but on the adjacent property. Indeed, Missouri case law imposed upon the operators a high degree of care when dealing with firearms. *Lee v Hartwig*, 848 SW2d 496, 500 (Mo. App 1992). In contrast, slag-hauling is not the type of activity which carries with it an unreasonable risk of harm, to the extent that International knew or should have known that its operation would have the same alleged unreasonable risk of harm off the premises as on the premises. Plaintiff's remaining cases are similarly distinguishable by the nature of the activity involved in the respective cases. See *Cessna v Coffeyville Racing Association,* 298 P2d 265 (Kan 1956) (duty imposed upon operators conducting automobile races on dirt track designed for running and trotting horse races; operators did not inspect the premises and understood that the track did not have bank curves); *Saldi v Brighton Stockyard Co*, 181 NE2d 687 (Mass 1962) (owner of stockyard company aware of danger of escaped cattle in strange environment of city streets; risk of unreasonable harm resulting from such escape known to possessor and inherent in the construction and operation of the loading-in platform). As noted in *Cessna*: "What are reasonable precautions vary with the character of the business, and the place in

which it is carried on. A peculiar hazard calls for increased care; and the greater the risk, the more imperative the obligation." 298 P2d at 267.

On this basis, this Court can distinguish the case law cited by Plaintiff, given the abnormally dangerous activities and factors involved in those case, and avoid addressing the question of whether Michigan *should* recognize such a duty in these circumstances.

Third, Plaintiff has failed to allege or demonstrate that International is a "possessor of land" under the meaning of § 371. "Possession," in the sense of dominion and control, is a prerequisite to a premise liability theory. *Nezworski v Mazanec*, 301 Mich 43, 56; 2 NW2d 912 (1942).

Fourth, Michigan should not recognize a common law duty under a theory of premises liability or protection from a dangerous condition imposed on a possessor when the incident takes place outside the premises. In Michigan, the duty of a land owner, or possessor of property, varies with the status of the person injured. See, e.g., *Kreski v Modern Wholesale Elec. Supply Co.*, 429 Mich 347, 359; 415 NW2d 178 (1987). The general rule of premises liability is that the one having control of the premises may be liable for failure to keep the premises in repair. International neither owned nor controlled the premises upon which the decedent was injured. Plaintiff encourages this Court to expand the law of negligence in Michigan so that the owner or possessor of property (here commercial property) is responsible for injuries arising from conditions upon unoccupied adjacent property, which it does not control. Such an expansion of the law should rest, if at all, in the hands of the Legislative branch through

codification of the law of negligence as it pertains to the duty of landowners and possessors. Compare and contrast plaintiff's authority of *Bober v New Mexico State Fair*, 808 P2d 614 (NM 1991) (court determines duty of occupier of land extends off the premises, relying on a state statute defining the duty to exercise ordinary care for the safety of the persons and property of others).

Lastly, Plaintiff fails to address whatsoever whether the Plaintiff's decedent was a "foreseeable plaintiff," which is a prerequisite for any duty of care imposed upon International or any of the defendants in this case. See *Palsgraf v Long Island R R Co.*, 162 NE 99 (NY 1928); *Kuhn v Associated Truck Lines, Inc.* 173 Mich App 295; 433 NW2d 424 (1988). Giving credence to the existence and sequence of Plaintiff's factual allegations for purposes of argument only, it is unreasonable to charge International with anticipating that a piece of slag generated from its operations would find its way into the tires/wheels of a tractor or trailer, be transported on a public highway, and dislodge, causing injury to the Plaintiff's decedent in a passing vehicle. No duty is owed to such an unforeseeable plaintiff. *Moning v Alfono*, 400 Mich 425, 439; 254 NW2d 759 (1977).

Plaintiff concedes by non-argument that Michigan does not recognize a duty of care arising out of contract in these circumstances. *Fultz v Union-Commerce Associates*, 470 Mich 460; 683 NW2d 587 (2004). Plaintiff otherwise abandoned the duty to inspect argument as to International.

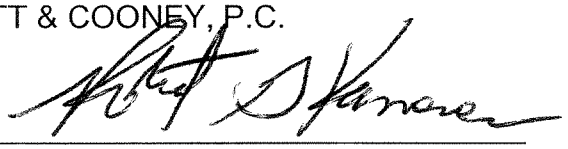
This Court should reverse and remand for entry of summary disposition in favor of International.

RELIEF

WHEREFORE, Defendant-Appellant International Mill Service, Inc., requests this Court grant leave to appeal and reinstate the trial court's grant of summary disposition, together with any other relief this Court deems appropriate, and award all costs and attorney fees sustained in pursuing this matter.

Respectfully submitted,

PLUNKETT & COONEY, P.C.

BY: 

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Dated: December 9, 2005

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PROOF OF SERVICE

STATE OF MICHIGAN)
) ss.
COUNTY OF OAKLAND)

Robert G. Kamenec being first duly sworn, deposes and says that he is a shareholder with the firm of Plunkett & Cooney, P.C., and that on the 9TH day of December, 2005 he caused to be served a copy of the Defendant-Appellant International Mill Service, Inc.'s Reply Brief and Proof of service upon:

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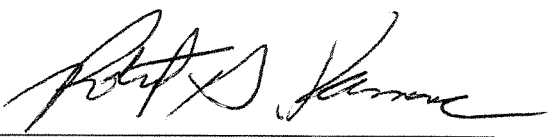

ROBERT G. KAMENEC

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